

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**RHONDA J. MOON**

Claimant

VS.

**NED HIATTS COUNTRY SALES, INC.**

Respondent

AND

**SENTRY INSURANCE**

Insurance Carrier

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Docket No. 268,071

**ORDER**

Claimant appealed the November 13, 2003, Award entered by Administrative Law Judge Brad E. Avery. The Board heard oral argument on April 20, 2004.

**APPEARANCES**

Paul D. Post of Topeka, Kansas, appeared for claimant. Janell Jenkins Foster of Wichita, Kansas, appeared for respondent and its insurance carrier.

**RECORD AND STIPULATIONS**

The record considered by the Board and the parties' stipulations are listed in the Award. The record also includes Dr. Mary Ann Hoffmann's June 9, 2003, report.

**ISSUES**

This is a claim for a May 14, 1999, accident, which allegedly injured claimant's low back. In the November 13, 2003, Award, Judge Avery denied claimant's request for workers compensation benefits after finding claimant did not sustain any functional impairment as the result of her May 1999 accident.

Claimant contends Judge Avery erred. Claimant argues the Judge should not have considered a causation opinion provided by Dr. Mary Ann Hoffmann as the doctor did not testify. Additionally, claimant argues the Judge misconstrued Dr. Vito J. Carabetta's testimony. Accordingly, claimant requests the Board to modify the Award and grant her

permanent disability benefits for a 10 percent whole body functional impairment and medical benefits.

Conversely, respondent and its insurance carrier contend the Board should affirm the Award. They argue claimant failed to prove (1) she sustained an accidental injury that arose out of and in the course of her employment with respondent and (2) the alleged accident caused her present permanent functional impairment.

The issues before the Board on this appeal are:

1. Did the Judge err by considering Dr. Hoffmann's causation opinion when the doctor did not testify?
2. Did claimant permanently injure her low back in an accident that arose out of and in the course of her employment with respondent?
3. If so, did claimant prove she sustained permanent impairment from that accident?
4. Is claimant entitled to an award for future medical benefits and medical benefits for the chiropractic treatment she received commencing June 2000?

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the entire record, the Board finds and concludes:

In February 1999, claimant began working for the respondent, a company which sold campers and recreational vehicles. Claimant testified that while at work on May 14, 1999, she fell down three steps as she exited a camper and hurt both her low back and shoulders. Claimant reported the incident to one of her supervisors.

According to claimant, respondent insisted she see a doctor and she, therefore, consulted with her family physician, Dr. James Seeman, who temporarily placed her on light duty. Claimant believes she saw Dr. Seeman the day after the alleged May 1999 accident. But claimant's medical records indicate claimant first saw Dr. Seeman in late August 1999 for injuries sustained after falling down some steps.

After a period of working light duty, claimant eventually returned to her regular job duties, which she performed for approximately one year. In June 2000, claimant awoke one morning with back symptoms and could hardly get out of bed. Claimant testified she knows of no intervening accident or injury between the May 1999 accident and her increased back symptoms in June 2000. According to claimant, between those incidents

her back “ached here and there, but [she] lived with it until the day [she] couldn’t get out of bed.”<sup>1</sup> Claimant testified, in part:

I was pretty good and then one morning I couldn’t get out of bed. I finally got around and I went out to work and Joyce [claimant’s supervisor] shuffled me off to Dr. Murray’s.<sup>2</sup>

Respondent then referred claimant to a chiropractor, Dr. Patrick E. Murray, who claimant began seeing on June 21, 2000.<sup>3</sup> After missing work for several weeks, claimant returned to work for respondent and again performed her regular job duties. In January 2001, claimant lost her job due to respondent’s financial difficulties.

At the time of the April 2003 regular hearing, claimant was working for a florist and earning wages comparable to those she earned while working for respondent.<sup>4</sup> According to claimant, she has not received any treatment for her low back following early January 2001 when she last saw Dr. Murray.

**1. Did the Judge err by considering Dr. Mary Ann Hoffmann’s opinions regarding the cause of claimant’s low back symptoms?**

While this claim was being litigated, Judge Avery appointed Dr. Mary Ann Hoffmann to evaluate claimant and report the findings. Claimant argues only Dr. Hoffmann’s opinions regarding functional impairment can be considered without the doctor’s deposition being taken.

Claimant premises her argument on the *Sims*<sup>5</sup> decision in which the Kansas Court of Appeals construed both K.S.A. 44-510e and K.S.A. 44-519. The Kansas Court of Appeals held it was improper to consider the portion of an independent medical examiner’s report that went beyond the worker’s functional impairment.

Following the *Sims* decision, the 2000 Kansas legislature amended K.S.A. 44-516. The amendment provided that the administrative law judges would consider, without any expressed limitation, the reports from the health care providers whom they had selected to examine an injured worker. Such was not the law when *Sims* was decided.

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<sup>1</sup> R.H. Trans. at 12-13.

<sup>2</sup> *Id.* at 12.

<sup>3</sup> Carabetta Depo. at 9.

<sup>4</sup> R.H. Trans. at 21.

<sup>5</sup> *Sims v. Frito-Lay, Inc.*, 23 Kan. App. 2d 591, 933 P.2d 161 (1997).

Furthermore, unlike *Sims*, the Judge specifically requested the doctor to provide a functional impairment opinion for the alleged work-related injury that claimant sustained working for respondent, along with an apportionment for any preexisting impairment. Conversely, in *Sims*, the opinion regarding fund liability, which was found to be inadmissible without the doctor's supporting testimony, was requested by someone other than the judge.

Consequently, the Board concludes the *Sims* decision did not preclude the Judge from considering Dr. Hoffmann's entire report, including the doctor's opinions concerning the cause of claimant's permanent functional impairment.

**2. Did claimant prove she sustained either permanent impairment or permanent injury as the result of the May 1999 work-related accident?**

Claimant's testimony is uncontradicted that she fell while performing her work duties and experienced low back pain. In addition, claimant's testimony is uncontradicted she promptly provided notice of the accident to respondent and she immediately sought medical treatment.

Accordingly, the Board finds claimant sustained personal injury by accident arising out of and in the course of her employment with respondent and that she provided respondent with timely notice of the accident. Despite the discrepancies regarding the date of accident, the accident did occur.

Nonetheless, the Board agrees with the Judge that claimant failed to prove that her accident caused either permanent injury or permanent impairment. The Board also concludes the evidence fails to prove her increased back symptoms in either late May or June 2000 were related to the 1999 fall at work.

The record includes several dates of accident that claimant may have sustained her accident at work. When claimant filed this claim with the Division of Workers Compensation in July 2001, she reported the accident occurred on or about May 23, 2000. But in March 2003, claimant filed an amended application with the Division in which she reported the accident occurred on or about May 14, 1999. At the April 2003 regular hearing, claimant testified the accident occurred in May 1999.

Nonetheless, the medical records from Dr. Seeman, whom claimant allegedly saw on the day after the accident, indicated that he actually saw her on August 31, 1999.<sup>6</sup> Moreover, in September 2002, when claimant saw Dr. Peter V. Bieri at her attorney's request, claimant told the doctor she agreed with the medical records that indicated her

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<sup>6</sup> Bieri Depo. at 6, 10.

accident occurred on or about August 31, 1999.<sup>7</sup> But when Dr. Vito J. Carabetta evaluated claimant in January 2003, she told the doctor the accident occurred in May 2000. And in June 2003, when claimant saw Dr. Mary Ann Hoffmann at the Judge's request, claimant provided that doctor with an August 1999 accident date.

In short, after her 1999 accident and after seeing her family doctor on at least one occasion, claimant continued working for respondent for a number of months without seeking any additional treatment until awakening one morning in June 2000 with severe back pain. Claimant then received chiropractic treatment on a regular basis until early January 2001, when she last received back treatment of any nature.

Claimant's expert witness, Dr. Bieri, determined claimant had a 10 percent whole body functional impairment under the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.) for a low back strain.

On the other hand, respondent and its insurance carrier's medical expert, Dr. Carabetta, could not determine when claimant's alleged accident occurred considering both her statements and her medical records. Moreover, Dr. Carabetta was unable to find claimant sustained any permanent injury as the result of an alleged May 2000 accident at work as there was nothing in her chiropractor's records linking the June 2000 symptoms to work. Furthermore, the doctor was unable to find claimant sustained any permanent injury as the result of an alleged August 1999 accident because of the period that had elapsed before claimant sought chiropractic treatment in June 2000.

Because of the divergent opinions of Dr. Bieri and Dr. Carabetta, Judge Avery appointed Dr. Hoffmann to evaluate claimant. Dr. Hoffmann was unable to relate claimant's low back symptoms to the accident at work. In a June 9, 2003, letter to the Judge, the doctor wrote, in part:

It is my opinion that the patient has chronic lumbar strain and early degenerative disk disease of the L5-S1 lumbar disk. That is probably due to a combination of normal aging processes and extensive smoking history, which can prematurely age the disk as well as a lack of exercise which can decrease strength and flexibility in the lumbar spine. Of note, her pain does get worse with her period and may be related to gynecological problems as well. However, I think it is somewhat of a reach to determine that the fall in August of 1999 is related to the severe pain she woke up with in May of 2000. I feel that these symptoms are not work-related. If they were, her impairment on the whole person would be 5% of the body as a whole based on the *Fourth Edition, AMA Guidelines to the Evaluation of Permanent Impairment*, which is found on page 113 under Category 2B of the chart on that page.

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<sup>7</sup> *Id.* at 10.

When considering the whole record, the Board is not persuaded claimant's 1999 accident at work caused her any permanent injury or impairment. Moreover, the Board is not persuaded that the severe low back symptoms claimant experienced in May or June 2000 were related to her accident at work. Claimant has failed to satisfy her burden of proof. Accordingly, the Award entered by Judge Avery should be affirmed.

**3. Is claimant entitled to an award for both future medical benefits and medical benefits for the chiropractic treatment she received commencing June 2000?**

Because claimant has failed to prove her present permanent impairment is related to an injury that she sustained at work, the request for future medical benefits should be denied. Furthermore, the request for medical benefits for the chiropractic treatment claimant received from Dr. Murray beginning in June 2000 is likewise denied as the evidence fails to establish its relationship to the alleged May 1999 accident.

**AWARD**

**WHEREFORE**, the Board affirms the November 13, 2003, Award entered by Judge Avery.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of April 2004.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Paul D. Post, Attorney for Claimant  
Janell Jenkins Foster, Attorney for Respondent and its Insurance Carrier  
Brad E. Avery, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director